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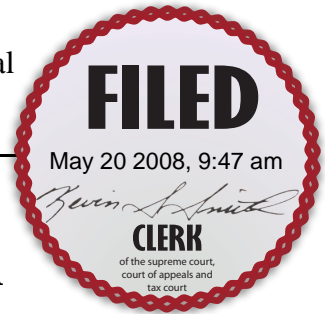
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**IN THE
COURT OF APPEALS OF INDIANA**

TOBY T. MAXWELL,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 20A03-0710-CR-467

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0603-FA-5

May 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Toby T. Maxwell appeals the trial court's denial of his motion to withdraw his guilty plea. Maxwell raises one issue, which we revise and restate as whether the trial court abused its discretion in denying his motion to withdraw his guilty plea. We affirm.¹

The relevant facts follow. Sometime between January 1, 1997, and January 1, 2000, Maxwell caused J.P., the seven-year-old daughter of a woman Maxwell was dating, to have sexual intercourse with him. The State charged Maxwell with three counts of child molesting as class A felonies.² On October 16, 2006, the day of the trial, Maxwell pleaded guilty to one count of child molesting as a class A felony, and the State dismissed the two remaining counts. On November 30, 2006, Maxwell filed a motion to withdraw his guilty plea. After a hearing, the trial court denied the motion. The trial court later sentenced Maxwell to forty years in the Indiana Department of Correction.

¹ A copy of the presentence investigation report on white paper is located in an envelope in the appellant's appendix. We remind the parties that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

- (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
- (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

² Ind. Code § 35-42-4-3 (2004) (subsequently amended by Pub. L. No. 216-2007, § 42 (eff. July 1, 2007)).

The issue is whether the trial court abused its discretion in denying Maxwell's motion to withdraw his guilty plea. Ind. Code § 35-35-1-4(b) governs motions to withdraw guilty pleas filed, as here, after a defendant has pleaded guilty, but before the trial court has imposed a sentence. The trial court must allow a defendant to withdraw a guilty plea if "necessary to correct a manifest injustice." Brightman v. State, 758 N.E.2d 41, 44 (Ind. 2001) (quoting Ind. Code § 35-35-1-4(b)). By contrast, the trial court must deny the motion if withdrawal of the plea would "substantially prejudice[]" the State. Id. (quoting Ind. Code § 35-35-1-4(b)). In all other cases, the trial court may grant the defendant's motion to withdraw a guilty plea "for any fair and just reason." Id. (quoting Ind. Code § 35-35-1-4(b)).

"Manifest injustice" and "substantial prejudice" are necessarily imprecise standards, and an appellant seeking to overturn a trial court's decision faces a high hurdle under the current statute and its predecessors. Coomer v. State, 652 N.E.2d 60, 62 (Ind. 1995). "The trial court's ruling on a motion to withdraw a guilty plea arrives in this Court with a presumption in favor of the ruling." Id. We will reverse the trial court only for an abuse of discretion. Id. In determining whether a trial court has abused its discretion in denying a motion to withdraw a guilty plea, we examine the statements made by the defendant at his guilty plea hearing to decide whether his plea was offered "freely and knowingly." Id.

Maxwell argues that "the lack of meaningful communication between client and counsel, and [Maxwell's] complete lack of confidence in the trial preparation by his attorney, rendered his plea involuntary." Appellant's Brief at 12. Essentially, Maxwell's

argument is that he was denied the effective assistance of counsel and that his plea was therefore involuntary, both of which, by statute, are claims of manifest injustice. See Ind. Code § 35-35-1-4(c).

At the guilty plea hearing, the trial court asked Maxwell if he was satisfied with his attorney's advice and representation, and Maxwell responded that he wished his attorney had "been more attentive" to his case and had interviewed certain witnesses, including the victim. Transcript at 84. The trial court ordered Maxwell's attorney to confer with Maxwell off the record as to why he had not deposed the victim, after which the following colloquy ensued:

[Maxwell's attorney]: Your Honor, I have had the opportunity to discuss why I did not take the deposition with Mr. Maxwell.

THE COURT: Do you understand why your lawyer elected not to take the alleged victim's deposition?

[Maxwell]: Yes, sir; yes.

THE COURT: Does it make sense to you?

[Maxwell]: Somewhat.

THE COURT: All right. Do you have any other objection or any other shortcoming that you would like to address concerning his representation of you?

[Maxwell]: (pause) No.

THE COURT: Can you think of anything else that he should have done that he did not do?

[Maxwell]: Well, he just, you know.

THE COURT: Pardon?

[Maxwell]: No, sir.

THE COURT: Do you want to go ahead with this plea or not?

[Maxwell]: Yes, sir.

Id. at 86-87. Maxwell then admitted that he had not been threatened or coerced to plead guilty and that his plea was voluntary. The trial court's questions suggest an appropriate attempt to probe beneath the surface of the plea agreement and, if not elicit Maxwell's true motivation for pleading guilty, at least determine that the plea was knowing and voluntary. See Coomer, 652 N.E.2d at 62.

The trial court then engaged Maxwell in an extensive colloquy advising him of his constitutional rights, and Maxwell responded that he understood those rights. The trial court recited the elements of the information against him, the State's burden of proof, and the range of penalties to which he could be sentenced, stating that the sentence could not be suspended. After responding that he understood each of the trial court's admonishments, Maxwell admitted that, when he was twenty-five years old, he caused J.P., then seven years old, to have sexual intercourse with him. When asked how he knew J.P., he stated that he "used to date her mom." Transcript at 96.

At the hearing on the motion to withdraw his guilty plea, represented by new counsel, Maxwell complained that his former attorney had visited him infrequently and had not prepared an adequate defense. He also complained that his former attorney had failed to contact potential witnesses from a list Maxwell gave him. However, a defendant has the burden to prove with specific facts that he should be permitted to withdraw his plea. Smith v. State, 596 N.E.2d 257, 259 (Ind. Ct. App. 1992). Maxwell has neither

named these potential witnesses nor asserted how their testimony would have aided his defense. We also note that Maxwell did not call his former attorney as a witness during the hearing on his motion. “The trial court was entitled to infer that counsel would have testified otherwise had he been called.” Coomer, 652 N.E.2d at 63.

Maxwell also claimed at the hearing on the motion that he did not commit the offense to which he had earlier pleaded guilty. In making this argument to the trial court, Maxwell admitted that he had lied under oath at the guilty plea hearing. Accordingly, the trial court was permitted to find his testimony less than credible.³ See Gipperich v. State, 658 N.E.2d 946, 949 (Ind. Ct. App. 1995) (“The trial court did not abuse its discretion in determining that Gipperich’s self-serving statements after the guilty plea hearing were incredible and constituted an attempt to manipulate the system.”), trans. denied.

Maxwell has not overcome the presumption of validity accorded the trial court’s denial of his motion to withdraw his guilty plea. Such a denial was within the discretion of the court, and we cannot say its refusal to allow Maxwell to withdraw his guilty plea constitutes manifest injustice. See, e.g., Coomer, 652 N.E.2d at 63 (holding that the refusal to allow defendant to withdraw his guilty plea did not constitute manifest injustice).

For the foregoing reasons, we affirm the trial court’s denial of Maxwell’s motion to withdraw his guilty plea.

³ Maxwell also claims that his counsel at the guilty plea hearing urged him to plead guilty “despite his innocence” because his counsel claimed that they “could amend the charge later.” Appellant’s Brief at 7. However, at the hearing on Maxwell’s motion to withdraw his guilty plea, the trial court excluded this testimony as hearsay. Maxwell does not argue that the trial court abused its discretion in excluding this testimony. Accordingly, we need not address Maxwell’s claim.

Affirmed.

NAJAM, J. and DARDEN, J. concur